In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1130

LEONARD E. NOREN AND HARRY C. PERRY, PETITIONERS

v.

ROBERT E. MCCARTHY, SUCCESSOR TO WALTER E. BECK, AS MANAGER OF THE UNITED STATES LAND OFFICE AT SACRAMENTO, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on a preliminary motion in Civil No. 2139–ND is reported at 199 F. Supp. 708. The opinion of the district court in Civil No. 2347–ND (Pet. App. 6–8) is not reported. The opinion of the court of appeals (Pet. App. 1–5) is reported at 370 F. 2d 845.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1966. A petition for rehearing was denied on February 8, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

282-406—67

QUESTION PRESENTED

Whether the judgment appealed from was a final, appealable decision.

STATEMENT

This is an action to review the decision of the Bureau of Land Management, Department of the Interior, denying petitioners' applications for entry upon certain lands pursuant to the Desert Lands Act (43 U.S.C. 321–339). After exhausting their administrative remedies within the Department of the Interior, the petitioners first brought suit in the Southern District of California (Civil No. 2139–ND) against respondent's predecessor in office. The complaint in that action prayed that the decision rejecting petitioners' applications be set aside as "arbitrary, capricious, discriminatory, unlawful and in excess of the statutory powers" of respondent, that petitioners' applications be reinstated and that petitioners be allowed to enter the lands described in their applications. The district court denied petitioners' request for a trial *de novo* (199 F. Supp. 708). Upon a review of the administrative record, the court found that "the administrative decision and the findings on which it is based are abundantly supported by the evidence appearing in the record"; the court therefore affirmed the administrative decision and dismissed the complaint. No appeal was taken from that judgment.

Prior to the entry of judgment in Civil No. 2139–ND, petitioners instituted a second action against respondent (Civil No. 2347–ND) in which they again prayed that their applications be reinstated and that they be allowed to enter the lands described therein.

Thereafter, the district court denied respondent's motion to dismiss the complaint as *res judicata*. The court then held (Pet. App. 6–8) that the petitioners had been denied due process in the administrative proceedings; it therefore remanded the case to the Department of the Interior "for the purpose of setting aside" the decision rejecting petitioners' applications and "conducting further hearings consistent with the findings of this Court" (Pet. App. 10). Respondent subsequently appealed this latter judgment to the Court of Appeals for the Ninth Circuit. Petitioners moved to dismiss the appeal on the ground that the judgment was not appealable under 28 U.S.C. 1291. That motion was denied by the court of appeals, and subsequently the judgment was reversed as barred by the prior judgment in Civil No. 2139–ND (Pet. App. 1–5).

ARGUMENT

The sole question presented by the petition is whether the judgment of the district court setting aside the decision of the Secretary of the Interior was a "final decision" within the meaning of 28 U.S.C. 1291 and hence appealable. Petitioners do not here challenge the holding that the action in which the appeal was taken was barred as *res judicata*, but only the jurisdiction of the court of appeals.

Petitioners contend (Pet. 5) that the decision was not final because "the remand came at a time when several material issues remained without adjudication in the lower court." But, whether or not the district court had considered all the grounds for relief presented by the complaint, it is not apparent what fur-

ther remedy the court could grant beyond setting aside the administrative decision and remanding for further proceedings. It is not suggested that the district court could itself make the determinations committed by the Desert Lands Act to the discretion of the Secretary of the Interior or his designee. The district court's opinion (Pet. App. 6–8) gives no indication that the court supposed that further relief was to be had, or that jurisdiction was retained for any purpose, or that the decision was other than final. The decision clearly terminated the litigation by setting aside the action complained of. Defects in any subsequent administrative action would of course have given rise to a new cause of action.

Furthermore, petitioners' contention would effectively deny an administrative agency any appellate review of a decision determining the nature of the proceedings it must conduct. Once the Department of the Interior had accorded petitioners the type of hearing required by the district court, that question would be unreviewable as moot. Petitioners thus ignore this Court's repeated holding "that the requirement of finality is to be given a 'practical rather than a technical construction.' *Cohen* v. *Beneficial Industrial Loan Corp.* [337 U.S. 541, 546]." *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
GEORGE R. HYDE,
Attorneys.

MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967